

**Editor's note: Appealed -- aff'd 737 F.Supp. 629 (D.Utah May 16, 1990); Aff'd No. 90-4091 (10th Cir. Nov. 18, 1991), 949 F.2d 362; appeal also filed sub nom. Garfield County v. Lujan, Civ.No. 90-C-776-J (D. Utah), rev'd and remanded (D.Utah Sept. 20, 1990), rev'd for lack of jurisdiction, Nos. 92-4162, 92-4171 (10th Cir. Nov. 24, 1993)**

SIERRA CLUB ET AL.

IBLA 89-356  
IBLA 89-575

Decided September 29, 1989

Appeals from decisions of the Cedar City and Richfield, Utah, District Offices, Bureau of Land Management, making a finding of no significant impact for a proposal to improve the Burr Trail. EA # UT-040-89-6.

Appeal from a decision of the Escalante (Utah) Resource Area Office, Bureau of Land Management, making a finding of no significant impact for the proposed Wagon Box gravel pit. EA # UT-89-32.

Affirmed in part, set aside and remanded in part.

1. Rights-of-Way: Revised Statutes Sec. 2477

The grant of a right-of-way under R.S. 2477 arose when a public highway over unreserved public lands was established pursuant to the laws of the jurisdiction where the land is located. A decision of BLM on judicial remand finding such a right-of-way exists will be affirmed where it is consistent with a ruling of the Federal court which is binding on the parties before the Board.

2. Federal Land Policy and Management Act of 1976: Wilderness--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-Way: Revised Statutes Sec. 2477

Where an R.S. 2477 right-of-way is found to exist across public lands for a county road bordering WSA's, the right to maintain and improve that right-of-way, measured by what is reasonable and necessary in light of preexisting uses of the road at the time of repeal of R.S. 2477, constitutes a valid existing right under the FLPMA. Notwithstanding this limitation on the authority of BLM, the obligation of BLM under sec. 603(c) of FLPMA to manage the public lands so as to avoid unnecessary and undue degradation of WSA's may require preparation of an environmental assessment with respect to the impact of construction of road improvements proposed by

the county to ascertain whether they may involve any unnecessary or undue degradation to WSA's which would require preparation of an environmental impact statement.

3. National Environmental Policy Act of 1969: Environmental Statements

An environmental assessment of a proposed road improvement project will be set aside and remanded where the scope of the project is segmented and the assessment fails to consider the impact of connected actions which are interdependent parts of a larger action and depend on the larger action for their justification.

APPEARANCES: Wayne G. Petty, Esq., and William J. Lockhart, Esq., Salt Lake City, Utah, and Lori Potter, Esq., Denver, Colorado, for appellants; Ronald W. Thompson, Esq., and Barbara J. Hjelle, Esq., St. George, Utah, and Patrick B. Nolan, Esq., Garfield County Attorney, Panguitch, Utah, for Garfield County; and David K. Grayson, Esq., Assistant Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The appeal docketed as IBLA 89-356 has been filed by the Sierra Club, the National Parks and Conservation Association, the Southern Utah Wilderness Alliance, and The Wilderness Society from separate decisions of the District Managers, Cedar City and Richfield Districts, Bureau of Land Management (BLM), dated March 8, 1989. These decisions each constituted a "Finding of No Significant Impact" (FONSI) for the road improvement project proposed for the Boulder to Bullfrog Road (Burr Trail) in southeastern Utah. The FONSI's were based on an environmental assessment (EA) dated March 7, 1989 (EA # UT-040-89-6). <sup>1/</sup>

The subsequent appeal docketed as IBLA 89-575 has been filed by the same appellants from a FONSI made by the Escalante (Utah) Resource Area Office, BLM, based on the EA (EA # UT-89-32) conducted for the proposed Wagon Box gravel pit. Subsequent to the FONSI and prior to receipt of appellants' notice of appeal, it appears that the permit for extraction of gravel was issued to Garfield County pursuant to section 1 of the Materials Act of 1947, as amended, 30 U.S.C. § 601 (1982), and the regulations at 43 CFR Part 3620. <sup>2/</sup> The record discloses that the intended use of the gravel is for surfacing a portion of the Burr Trail located approximately 2-1/2 miles from the pit.

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<sup>1/</sup> In an earlier ruling in this matter, we found that the effect of the BLM decision was stayed pending appeal pursuant to the regulation at 43 CFR 4.21(a) and granted a motion for expedited review. Sierra Club, 108 IBLA 381 (1989).

<sup>2/</sup> By order of the Board dated Aug. 4, 1989, this decision was put into effect in the public interest pending final resolution of the appeal pursuant to the regulation at 43 CFR 4.21(a).

Appellants have requested that this latter appeal be consolidated with the appeal of the Burr Trail improvement project. Respondents Garfield County and BLM have opposed the request on the ground that the issues are distinct. We have consolidated these appeals for review because they share a closely related factual context and considerations of efficiency of administrative review regarding this complex matter dictate the appeals be considered together.

The Burr Trail covers a distance of approximately 66 miles through Garfield County, Utah. The road extends from the town of Boulder in a southeasterly direction through Capitol Reef National Park (Capitol Reef NP) to a terminus near the Bullfrog Marina on Lake Powell within the Glen Canyon National Recreation Area (Glen Canyon NRA) administered by the National Park Service (NPS). The road has been described in appellants' brief as follows:

The Burr Trail is a scenic dirt road that winds through canyons, tops high plateaus and crosses stream drainages in an area of unparalleled red sandstone landscapes in southeastern Utah. Along its 66-mile course, the Burr Trail passes between  
and bounds two wilderness study areas, [3/] and abuts a third,  
as it traverses two different segments of BLM-administered lands. It also winds through two units of the national park system, Capitol Reef National Park, where it abuts three proposed NPS wilderness units and descends the spectacular Water-pocket Fold  
in a series of switchbacks, and Glen Canyon National Recreation Area.

(Appellants' statement of reasons for appeal (IBLA 89-356) at 2). In each of the FONSI's under appeal, BLM recognized the existence of a right-of-way under R.S. 2477 4/ for the segments of the Burr Trail crossing the public domain.

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3/ Wilderness study areas (WSA's) are those roadless areas of the public lands exceeding 5,000 acres identified during the public land inventory as having wilderness characteristics. The Secretary of the Interior is obligated to study these areas and give a recommendation to Congress regarding whether the area is suitable for preservation as wilderness. Federal Land Policy and Management Act of 1976 (FLPMA), § 603(a), 43 U.S.C. § 1782(a) (1982). During the period of such review and until Congress has directed otherwise, these lands are to be managed "so as not to impair the suitability of such areas for preservation as wilderness \* \* \* Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." FLPMA, § 603(c), 43 U.S.C. § 1782(c) (1982).

4/ Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (formerly codified at 43 U.S.C. § 932), repealed by FLPMA, P.L. 94-579, § 706(a), 90 Stat. 2793 (1976). This statute provided that: "The right of way for the construction of highways over the public lands, not reserved for public uses, is granted."

The proposed action analyzed by BLM was described in the 1989 EA (UT-040-89-6) as follows:

The County proposes to upgrade those portions of the existing Boulder to Bullfrog Road that are located on BLM administered or state lands. \* \* \*

The current proposal calls for either a paved or gravel surface travel width of 24 feet with a design speed of 30 to 40 miles per hour. The project also involves moving the existing roadway from a riparian area to a bench area near "The Gulch" along with minor grade and alignment changes throughout the public lands involved (described as segments 1 & 3 in the 1985 EA [5/] and the 1988 draft EA [6/]). The project does not involve any activities within units of the National Park System, although Garfield County's purpose is to eventually construct a paved roadway from Boulder to the Bullfrog area of Lake Powell.

(1989 EA at 3). The segments of the road referred to which cross public lands administered by BLM stretch from Boulder to the western edge of Capitol Reef NP within the Cedar City District (segment 1) and from the eastern boundary of Capitol Reef NP to the north boundary of the Glen Canyon NRA within the Richfield District (segment 3).

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5/ National Park Service and Bureau of Land Management, U.S. Department of the Interior, Draft Environmental Assessment on Paving the Boulder-to-Bullfrog Road (May 1985). This EA was conducted pursuant to the direction of the Joint Congressional Conference Committee which deleted funds proposed by the Senate "to pave the Burr Trail and upgrade it into an all-weather, scenic highway linking the Utah towns of Boulder and Bullfrog" pending completion of the EA. H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess., 130 Cong. Rec. H 11,922 (daily ed. Oct. 10, 1984).

The EA noted that:

"In the seventies and early eighties there were several proposals to upgrade this road. In May 1984 the 'Boulder-Bullfrog Scenic Road' Preliminary Engineering report was prepared by Creamer and Noble Engineers and the Five County Association of Governments, proposing to construct an all-weather road on the existing roadway location. This assessment is developed to array for public review the proposal to pave, and to provide additional alternatives for all-weather roads over the existing route."

(1985 EA at 1). After studying several alternatives presented in the EA, a joint FONSI dated Dec. 9, 1985, was made by officials of BLM and NPS based on a recommendation that "the entire length of the trail become a rural scenic road maintained by and under the jurisdiction of the National Park Service. The road would adhere to the present horizontal and vertical alignment and cross section but would be improved to an all-weather gravel surface" (FONSI at 2). This recommendation, often referred to as the Mott proposal, apparently was not acted upon.

6/ JBR Consultants Group, Draft Environmental Assessment Boulder to Bullfrog Road (Burr Trail) (December 1988).

The introduction to the 1989 EA recited that it was intended to be a supplement to the 1985 EA. Each of the BLM decisions provided the same rationale for the FONSI: Garfield County has a valid existing R.S. 2477 right-of-way for the road, the proposed action would not result in any unnecessary or undue degradation of the adjacent WSA's, and the 1985 EA did not identify any significant environmental impacts for the 66-mile road improvement project considered therein.

The decisions of BLM from which these appeals are brought were issued on judicial remand following litigation in the Federal courts regarding the earlier plans of Garfield County to improve (but not pave) the western 28 miles of the road (segment 1). This proposal was the subject of a lawsuit by appellants against BLM and Garfield County asserting that BLM had breached its responsibilities under section 102 of the National Environmental Protection Act of 1969 (NEPA), 42 U.S.C. § 4332 (1982), and FLPMA, 43 U.S.C. §§ 1701-1784 (1982), regarding management of the affected public lands. The litigation resulted in a remand of this matter to BLM to conduct an EA of the proposed action and to generate either an environmental impact statement (EIS) or a FONSI. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), aff'g in part and rev'g in part, 675 F. Supp. 594 (D. Utah 1987).

In the statement of reasons for appeal, appellants challenge the 1989 BLM FONSI pointing out that NPS comments to the 1988 draft EA indicated the planned realignment of the eastern segment of the road adjacent to Capitol Reef NP would require realignment within the park affecting pro-proposed wilderness units. Appellants also challenge the effort of BLM to justify the 1989 EA as a supplement to the 1985 EA on which the 1985 FONSI was based. Appellants note that the 1985 FONSI was predicated on the Mott proposal (see note 5, supra) which contained substantial protective measures which were abandoned in the current proposal. Further, the nature of the work proposed for both BLM segments has been expanded to include paving of the road.

Appellants assert that the 1988 draft EA found extensive and significant impacts would result from the proposed action, including an increase of more than 1200 percent in traffic flow and a change in the nature of the use pattern to RV/ATV/ORV/camping oriented use, generating a demand in excess of the capacity of existing facilities. Increased use would require improved facilities, likely lead to commercial development, and increase the probability of unregulated ORV use. Appellants contend that NPS comments on the 1988 draft EA and 1989 FONSI set out the inadequacy of the 1988 draft EA and the 1989 EA with respect to the analysis of impacts on Capitol Reef NP. Appellants argue that the concept of significance embraces the factor of proximity to unique areas or park lands. It is asserted by appellants that the scope of the 1989 EA was improperly segmented by BLM in violation of the requirements of NEPA. Thus, the 1989 EA acknowledged potentially significant impacts noted by the 1988 draft EA and in NPS comments, but held these would not "automatically" result because further NPS review under NEPA would be required. Appellants contend this approach violates the NEPA requirement to consider connected actions--interdependent parts of a larger action which depend on the larger action for their justification.

Further, appellants argue that the "law of the case" as established in the litigation does not support limitation of the scope of analysis regarding the impacts of the present proposal which is larger in length and scope of impact than the project before the courts. Finally, appellants argue that BLM improperly found that Garfield County held an R.S. 2477 right-of-way for the eastern segment of the Burr Trail without any analysis of the evidence.

With respect to the appeal of the FONSI for the Wagon Box gravel pit, appellants contend that consideration of this issue separately from the impact of the Burr Trail improvements constitutes an improper segmentation of the environmental analysis. Appellants argue the EA for the Burr Trail should have considered sources of borrow material. Further, appellants assert that the EA for the gravel pit improperly failed to consider the effects of placing gravel on the access road to the pit. Appellants also challenge the reference in the EA to the existing access road as a county road.

In answer to appellants' statement of reasons for appeal, BLM asserts that the litigation in this case was precipitated by a contract, referred to as the Harper contract, to improve a 28-mile segment of the Burr Trail from Boulder to the western boundary of Capitol Reef NP. In the litigation, BLM took the position that the R.S. 2477 right-of-way was a valid existing right and, hence, there was no major Federal action involved in ensuring that the county stayed within the extent of its right-of-way. However, the Tenth Circuit found that an EA was required under NEPA to assess the impact of improvements on adjacent WSA's and to determine whether an EIS is required. BLM points out that the terms of the court remand limited the NEPA review

to impacts which are relevant to its duty to prevent unnecessary degradation of WSA's. BLM contends that the ruling on the scope of NEPA review is relevant to improvement of any part of the road and that this is part of the "law of the case" which is binding on the Board in deciding this appeal. BLM asserts that the finding by the court of the existence of an R.S. 2477 right-of-way applies to the whole road, not just the western segment, and, in any event, the Board is not the proper forum for adjudicating the existence of an R.S. 2477 right-of-way. Finally, BLM contends that a cumulative impact review is not necessary since NPS has not cooperated and the county has expressed no intent to improve the road across NPS lands.

In answer to the appeal of the gravel pit FONSI, BLM notes that the section of the Burr Trail for which the gravel is to be used was released by the court from the injunction pending completion of the EA of other aspects of the Burr Trail improvement project on judicial remand. Thus, BLM asserts application of the gravel is not in violation of the injunction or the administrative stay recognized on remand. BLM contends the EA was not improperly segmented since the county has a recognized right to maintain its R.S. 2477 right-of-way regardless of the status of the larger plan to improve the Burr Trail. The BLM answer asserts the FONSI should be upheld as reasonable based on the record, noting the right of the county to bring in gravel from its alternate source near Boulder, an alternative found to be more environmentally damaging than use of the Wagon Box pit.

Garfield County has also filed an answer to appellants' statement of reasons. The county points out that it entered into an agreement with BLM in 1970 under the terms of which it agreed to maintain the road for the entire Burr Trail from Boulder to Lake Powell. Further, the county argues that the applicability of NEPA requires a major Federal action which in turn requires a finding that BLM has authority to exercise control over the county's road improvement project. Under the court's ruling, it is BLM's duty pursuant to section 603(c) of FLPMA to prevent unnecessary degradation of WSA's which raises the matter to the level of a major Federal action and the county contends the NEPA analysis is properly limited to the issues related to the basis of BLM authority over the right-of-way, *i.e.*, the avoidance of unnecessary degradation of WSA's. Further, the county argues that the BLM Interim Management Plan (IMP) for WSA's defines undue degradation in relation to the failure to use the best reasonably available technology. Thus, the county contends the issue on appeal is the reasonableness of BLM's NEPA analysis of the impact of road improvements on WSA's in terms of whether these impacts result from the failure to use the best reasonably available technology and, if so, whether any such impact would be significant. The county argues that the scope of the NEPA inquiry is properly limited to impacts on WSA's and not impacts on other public lands and NPS lands. The county points out that the 1989 EA is distinguishable from the 1985 EA in that the work will be performed by the county pursuant to its right-of-way rather than by the Federal Government.

In answer to the appeal of the FONSI for the gravel permit, the county points out that the gravel is intended for use on a 14-mile stretch of the Burr Trail which has been released from the court's injunction and on which the county is entitled to apply the gravel surface. The county contends appellants have failed to show the EA failed to consider a substantial environmental question of material significance. Further, the county disputes appellants' contention that the EA was improperly segmented. With respect to the access road, the county asserts that it has been maintaining this road pursuant to an agreement entered into with BLM in 1970. Further, the county contends that ownership of the access road by either BLM or the county is immaterial as BLM would have the right to approve application of gravel to this preexisting section of road.

Several major issues are raised by review of the adequacy of the EA prepared by BLM for the road improvement project. A threshold question is whether BLM properly found the County has an R.S. 2477 right-of-way for segment 3 of the road. A further issue presented is the effect of the law of the case as set forth by the court in Sierra Club v. Hodel, *supra*. An additional issue is the sufficiency of the EA prepared by BLM, including the question of whether BLM properly determined the scope of the proposed action.

[1] The grant of a right-of-way under R.S. 2477 arose when a public highway over unreserved public lands was established pursuant to the laws of the jurisdiction where the land is located. Wilkenson v. Department of the Interior, 634 F. Supp. 1265, 1272 (D. Colo. 1986); Leo Titus, Sr., 89 IBLA 323, 335-36, 92 I.D. 578, 586 (1985). The Department has generally held that the proper forum for adjudicating the existence and scope of R.S. 2477

rights-of-way is a court of appropriate jurisdiction in the state in which the road is located. Leo Titus, Sr., supra at 337, 92 I.D. at 586-87. However, an exception has been recognized where a determination by BLM is necessary to facilitate proper administration of the public lands. See Leo Titus, Sr., supra at 338, 92 I.D. at 587; Nick DiRe, 55 IBLA 151 (1981); Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976). We think the present case constitutes such an exception.

In discussing the Burr Trail as it extends 66 miles from Boulder to the Glen Canyon NRA the court found that: "The combination of public uses and county maintenance has created a right-of-way in favor of Garfield County, pursuant to Congress' grant of public land in R.S. 2477." 848 F.2d at 1073. Appellants argue that this finding is limited to the western section of the road (segment 1) on which the proposed improvements were reviewed by the court, and that BLM has an obligation to make an independent determination with respect to the balance of the road (segment 3). In response, BLM contends that the court's finding based on the evidence considered was not limited to segment 1 and the finding should be construed to apply to the entire Burr Trail. We think BLM is properly reading the finding of the court, *i.e.*, a right-of-way has been established over the length of the Burr Trail. The Board and the parties are bound by the court's ruling in this regard.

Even were this not the case, the ruling of BLM that the Burr Trail is an R.S. 2477 right-of-way would have to be affirmed on the basis of the record before us. The county has submitted a copy of a memorandum of understanding (MOU) dated February 12, 1970, between BLM and Garfield County which recites that it was executed to clarify responsibility for road construction and maintenance in Garfield County (Exh. C to the county's brief). After noting the responsibility of BLM for managing the public lands and their resources including construction and maintenance of roads for such purposes, the agreement recognizes that: "The County is similarly responsible for the construction and maintenance of various county roads across public lands in Garfield County for public service purposes \* \* \*" (MOU at 1). Pursuant to the agreement, the Burr Trail is designated as a public road to be constructed and maintained by the county. Accordingly, the decisions of BLM must be affirmed to the extent they found the Burr Trail to be an R.S. 2477 right-of-way.

The county discloses that in February 1987 it entered into a contract with Harper Excavating, Inc. (Harper contract) to improve 28 miles of the Burr Trail Road by "improving and grading the road base, adding drainage and providing a uniform two-lane width" (Request to Bifurcate and Expedite Appeals at 2). This proposal was the subject of the litigation which led to the remand of this matter to BLM for preparation of an EA and either an EIS or a FONSI. It is clear that this is the proposal which was considered by the court in reviewing the adequacy of the BLM compliance with NEPA. Thus, the court found:

The current controversy arises out of the County's immediate plan to improve the western twenty-eight miles of the Burr Trail



from an essentially one-lane dirt road into an improved two-lane graveled road. 2/

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2/ The County plans eventually to improve the entire sixty-six-mile trail, as well as to pave it. These plans are not part of the current proposal. [Emphasis added.]

848 F.2d at 1073. In view of the limited scope of the proposed action reviewed by the court, both BLM and the county requested the Board to bifurcate the appeals from the Cedar City and Richfield District Offices because of the specific rulings of the court affecting the former decision on remand. The motion was opposed by counsel for appellants. In our prior decision in this case we denied the motion to bifurcate on the basis that the appeals are closely related as they deal with two segments of a larger road improvement project. Sierra Club, 108 IBLA 381, 385 (1989). The county and BLM have renewed their requests to bifurcate these matters with the filing of their answers to the brief of appellants.

[2] Although we have not bifurcated these appeals for purposes of review, it is clear that the parties and this Board are bound by the ruling of the court with respect to those aspects of the BLM decisions which implement the judicial remand. As to the scope of the county's R.S. 2477 right-of-way, the court held that the scope was determined by what was reasonable and necessary in light of the preexisting uses to which the right-of-way was put as of the repeal of R.S. 2477 on October 21, 1976. 848 F.2d at 1083-84. Among the uses found by the district court which were affirmed on appeal was tourist access to Bullfrog Marina on Lake Powell. Thus, the scope of the right-of-way was held to include "that which is reasonable and necessary to ensure safe travel for the uses above-mentioned, including improving the road to two lanes so travelers could pass each other." 848 F.2d at 1084. The court of appeals affirmed the district court holding that construction of a two-lane gravel road with adjoining culverts and ditches is reasonable and necessary to assure safe travel on the Burr Trail. Id. at 1084-85.

Citing the Department's Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72014, 72015-17 (Dec. 12, 1979), and Interim Management Policy and Guidelines (Revised IMP), 48 FR 31854, 31854-55 (July 12, 1983), the court found that the county's R.S. 2477 right-of-way constituted a valid existing right protected under FLPMA, § 701(h), 7/ and the IMPs. 848 F.2d at 1086. Quoting from the revised IMP, the court held that where it is found that valid existing rights, specifically the right to make reasonable and necessary improvements within the boundaries of the Burr Trail right-of-way, can be exercised only through actions which impair wilderness characteristics, these actions are subject to regulation to ensure that they do not degrade WSA's unnecessarily or

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7/ Section 701(h) of FLPMA provides that: "All actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. § 1701 note (1982).

unduly. 848 F.2d at 1086-88. Accordingly, the court defined the scope of the EA to be conducted by BLM on judicial remand: "[O]n remand BLM will be required to address environmental issues affecting only those areas in which, under the law of the case, it still has authority to act. \* \* \* BLM's authority is limited to what is relevant to its duty to prevent unnecessary degradation of the WSAs." 848 F.2d at 1096 (emphasis in original).

Thus, with respect to the proposal to improve segment 1 of the Burr Trail across public lands pursuant to the Harper contract involving grading and graveling the road (but not paving) to a two-lane width with drainage improvements, the issue is whether the record supports the BLM FONSI. The 1989 EA recites that it is intended to address a "grade and drain" alternative proposed by Garfield County which was not addressed in the 1985 EA but which was the subject of the December 1988 draft EA. The 1989 EA found that the proposed width of the improved right-of-way "is necessary to provide for the safe passage of cattle trucks, recreational vehicles and other large vehicles currently utilizing the road," and further found it to be the "least degrading alternative" noting that it is "designed to a non-commercial standard." 1989 EA at 5 (emphasis in original). The EA acknowledged construction would impact the width of the drainage channel in Long Canyon, but concluded that the proposal adopted used the most reasonable available technology in view of the expense and greater impacts to wilderness values associated with other alternatives. 1989 EA at 6. Based on the findings of the 1989 EA, the BLM District Manager determined that the proposed action would not result in any "undue or unnecessary degradation" to the Steep Creek or North Escalante Canyon/The Gulch WSA's, that such impacts are not expected to be significant, and, hence, that no EIS need be prepared for improvement of segment 1 of the Burr Trail. FONSI, March 8, 1989.

Analysis of the effects of the proposal in the 1988 draft EA resulted in a projected increase in traffic flow of from 133 to 433 percent (1988 Draft EA at 54). With respect to impacts of the proposal, the 1988 draft EA discloses that:

[In t]he floodplain of Long Canyon, major impacts are likely to occur. The proposed action calls for vertical and horizontal realignment and widening [of] the road, and consequently the stream channel would be encroached upon. An analysis of the existing road location, the channel location and the proposed roadwork shows that from the mouth of Long Canyon to where the road leaves the main canyon to head up to the Long Canyon overlook, the channel is likely to be encroached upon for about 10,000 feet. \* \* \* The encroachment does not occur in one stretch of 10,000 feet, but occurs in many different spots along this stretch - for distances of between 100 and 1,500 feet. As no plans are included to re-establish the channel in these areas, channel capacity would be significantly diminished, or eliminated entirely. \* \* \*

In addition, channel meanders would be cut-off by this encroachment. Sinuosity would be much reduced as the channel

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would be forced to follow the straighter road alignment. This would in effect steepen the gradient of the channel. This, combined with the reduced capacity, would create a condition ideal for channel erosion and sediment transport. \* \* \*

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In summary, Long Canyon has evidence of fairly frequent high flows and impacts to the road itself, the channel condition in Long Canyon, and the downstream riparian areas in the Gulch would very likely be high. The increased sediments from Long Canyon would be deposited in The Gulch.

(1988 Draft EA at 42). Further analyzing the impact of roadwork in Long Canyon on soil erosion, it was noted that:

The soils in Long Canyon would be impacted by cutting of diagonal sideslopes along 6,800 feet of the 27,000 feet long roadway during road improvement construction. The application of the USLE equation to this phenomena reveals an increase in erosion from the natural rate of 0.9 tons/year to 17 tons/year (see Appendix 6 for details). The total annual deposition of sediments would equal 16 tons based on 0.93 acres of cut slopes. This indicates a greatly accelerated rate for localized sites, but the overall impact is slight for sediment loading in the watershed.

(1988 Draft EA at 43).

Referring to increased recreational pressures on wilderness areas the Draft EA concluded that:

The size and number of WSAs within the general area are sufficient to support the backcountry demands. \* \* \*

The WSA areas within Long Canyon would not be attractive to backcountry enthusiasts due to the construction activity and increased travel (133-433%) expected in Segment 1. The noise, dust and frequency of vehicle passage on the road could not be avoided by wilderness visitors in this narrow high-walled canyon. However, the current road presence and usage also somewhat degrades the wilderness experience in Long Canyon.

(1988 Draft EA at 47). In assessing the impacts of the proposal for improvement of segment 1 on WSA's "along the 19.3 miles of WSA/ISA borders," the EA found that "direct impacts to the WSAs would be minimal along segment 1" (1988 Draft EA at 48). The EA did note that: "Secondary impacts due to increased travel would reduce the wilderness values immediately adjacent to the road" (1988 Draft EA at 48).

The draft EA also noted that the expected "increase in visitor use would necessitate the provision of scenic turnouts, signing, and limited picnic facilities" (1988 Draft EA at 53). Specifically, the EA recognized

the need for "[l]arger and better trailhead facilities especially at Deer Creek and The Gulch" (1988 Draft EA at 53).

The term "unnecessary and undue degradation" is defined in the BLM IMP as follows: "Impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of the best reasonably available technology." IMP, 44 FR 72034 (Dec. 12, 1979). Accepting the county's valid existing right to improve the right-of-way subject to the statutory obligation of BLM to bar unnecessary and undue degradation of WSA's, our review of BLM's NEPA compliance with respect to the judicial remand of the Harper contract to improve and gravel (but not pave) segment 1 of the Burr Trail <sup>8/</sup> is guided by whether the record discloses that BLM took a hard look at the impacts of the proposed action on WSA's and supports the FONSI based on the absence of any unnecessary and undue adverse impacts to WSA's requiring preparation of an EIS. In view of the limited scope of the proposed action defined by the terms of the judicial remand, we find that the record (including the 1988 Draft EA and the 1989 EA) support the FONSI, *i.e.*, the absence of any unnecessary or undue degradation of any WSA which would give rise to a significant impact. Accordingly, we affirm the decision of BLM to this extent.

Having reviewed the adequacy of the EA and FONSI with respect to that portion of the project involving improvement including graveling (but not paving) of segment 1 which was remanded by the courts, we are now confronted with the question of the adequacy of the EA and FONSI's to support the further scope of the project considered therein, *i.e.*, improvement and paving of both segments 1 and 3 of the Burr Trail across public lands administered by BLM. A critical threshold question involves the scope of the EA. It is clear from the terms of the EA itself that BLM has limited its analysis to direct impacts of construction to adjacent WSA's:

The question of reasonably foreseeable/cumulative impacts is a more difficult situation because as discussed in the 1985 EA and reconfirmed by Garfield County, the current project is only 2 segments of a 4 segment project to pave the road between Boulder and Bullfrog.

JBR Consultants in its 1988 draft EA pointed out that a totally paved roadway could result in an overuse of existing recreational facilities, a change in tourist use patterns between Wayne and Garfield County and a change in visitor use patterns in the two National Park units. In addition, letters of comment from the National Park Service indicate potential impacts to Bighorn Sheep, Peregrine falcons, and wilderness values within the effected [sic] park units.

Thus, it appears that at least some potentially significant impacts could occur should the entire roadway be paved

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<sup>8/</sup> The court made it clear this was the scope of the proposal which it considered. Sierra Club v. Hodel, *supra* at 1073 n.2.

and bridges constructed. While we do not disagree with the conclusions reached by NPS and many other commentors, the key question we must address is "would approval of the County's proposal on public lands automatically produce the potentially significant impacts noted by the draft 1988 EA and the Park Service." Our finding is that it would not because unless or until the road is paved and the bridge across Bullfrog Creek constructed, the potentially significant impacts would simply not occur. Before such impacts could occur the National Park Service would be required to conduct their own NEPA Compliance as it pertains to Park lands and any specific impacts to public lands that would automatically result from their action.

It is recognized that a paved road on public lands that ends at the Park boundary increases the possibility of a paved road being constructed through the Park. This, however, is not a foregone conclusion as the National Park Service will respond as necessary to meet its responsibilities as discussed in the 1985 EA. [Emphasis in original.]

(1989 EA at 7).

[3] Regulations regarding the proper scope of an action for purposes of an EA pursuant to NEPA require consideration of "connected actions" which include actions which "[a]re interdependent parts of a larger action and depend on the larger action for their justification." 40 CFR 1508.25(a)(iii). In the context of Federally funded highway projects, factors found to be relevant in determining whether the EA has been improperly segmented have included whether the highway segment analyzed has logical termini; whether the segment has substantial independent utility; whether construction of the segment forecloses the opportunity to consider alternatives; and whether construction of the segment irretrievably commits Federal funds for closely related projects. Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981). <sup>9/</sup>

In this regard, the cumulative impact becomes a significant issue. Cumulative impact is defined as:

[T]he impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

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<sup>9/</sup> Although there is no indication in the record that Federal funds are involved in the road work by the county reviewed in this case, the factors relevant to scoping are the same once it is recognized, as the court did, that a major Federal action is involved. 848 F.2d at 1090.

40 CFR 1508.7. The regulations further provide that: "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or breaking it down into small component parts." 40 CFR 1508.27(b)(7). Thus, when making the EA under NEPA to determine whether preparation of an EIS is required, it is necessary to consider whether it is reasonable to anticipate cumulatively significant impacts from the proposed project when direct impacts are added to the impacts of reasonably foreseeable future actions related to the proposed project. Fritiofson v. Alexander, 772 F.2d 1225, 1243 (5th Cir. 1985); see Thomas v. Peterson, 753 F.2d 754, 758-761 (9th Cir. 1985); Glacier-Two Medicine Alliance, 88 IBLA 133, 145 (1985).

Applying this standard, we note that one of the primary objectives of Garfield County's road improvement project is to provide a safe, feasible route for through traffic from Boulder to Bullfrog Marina. The BLM EA acknowledges that paving of the road across BLM lands to the Park boundaries "increases the possibility of a paved road being constructed through the Park." Further, the EA notes "potentially significant" impacts disclosed by the 1988 draft EA and the comments in response thereto, including a change in tourist use patterns, overuse of existing recreational facilities, impacts to wilderness values, and impacts to wildlife. <sup>10/</sup> In spite of these findings, BLM did not find any significant impact because the construction across BLM lands would not "automatically" produce these impacts as NPS would be required to conduct a NEPA analysis of impacts to Park lands and to BLM lands which would result from its approval of the segments across NPS lands. This is a segmentation of the scope of the Burr Trail improvement project which is not permitted under NEPA and the implementing regulations.

While the discretion of BLM which gives rise to a major Federal action requiring an EA is limited to the authority to manage the public lands so as

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<sup>10/</sup> Among the impacts noted in the 1988 draft EA are loss of vegetation along segment 3 due to an increase in ORV use "where erosive soils and sparse slow-growing vegetation are susceptible to damage" (1988 Draft EA at 45) and the need to improve picnic, camping, and trailhead facilities as well as ranger patrols to deal with projected increases in visitor use of 133 to 433 percent. Id. at 53. The impacts to the cultural resources were also noted: "The increased visitation due to an improved road would bring more people in contact with known and unknown cultural sites in the canyons and on the mesas. People would tend to collect artifacts from sites and isolated finds." Id. at 50. Under cumulative impacts, the 1988 draft EA notes that: "The mix of recreational visitors would change from the hiker/backpacker/mountain bike type to a RV/ATV/ORV/camping, vehicle oriented type." Id. at 78. The comments on the 1988 draft EA by the Superintendent, Capitol Reef NP, note the need to assess the impact of increased visitor use on segments 2 and 4 of the road through NPS lands; the impact on cultural resources sites within NPS lands, noting the presence of sites near the road within Capitol Reef NP; and the impact on NPS wilderness units with Capitol Reef NP (Appendix C to appellants' statement of reasons).

to avoid unnecessary and undue degradation of WSA's, this does not provide a basis for improperly segmenting the scope of the project for purposes of the EA or for ignoring the impacts of connected actions likely to result from the project on the basis that these connected actions would not "automatically" occur. This is true in terms of both the impacts to the BLM WSA's and to the NPS-administered lands in Capitol Reef NP and Glen Canyon NRA. Courts have found that the authority of the Secretary to regulate lands within a national park to "conserve the scenery and the nature and historic objects and wildlife therein" under 16 U.S.C. § 1 (1982) applies to regulation of an R.S. 2477 right-of-way within the park. United States v. Vogler, 859 F.2d 638, 642 (9th Cir. 1986); see Wilkenson v. Department of the Interior, *supra*. We do not read the opinion of the court to require BLM when conducting its EA of the proposal to improve (and pave) the length of the Burr Trail to segment the proposal or ignore the cumulative impacts of the proposal. Indeed, the court expressly noted the absence of BLM authority to regulate improvements to an R.S. 2477 right-of-way "that do not affect WSAs or implicate other federal duties containing some measure of discretion." 848 F.2d at 1090. It appears from the record that paving the entire road would subject the BLM WSA's and the NPS lands in Capitol Reef NP to potentially significant impacts inconsistent with the FONSI's herein.

Although it may be appropriate to incorporate in this EA relevant portions of the 1985 EA which led to the FONSI predicated on the Mott proposal, this requires an analysis of the similarities and differences between the current proposal and the Mott proposal and how this affects the analysis of environmental impacts. Thus, the Mott proposal which was the subject of the FONSI based on the 1985 EA did not include paving of the road. Further, the FONSI was predicated on a "limited improvement alternative" under which the road "would be improved to an all-weather gravel surface" (December 9, 1985, FONSI at 2).

With respect to the appeal of the Wagon Box gravel permit, we found in our prior order of August 4, 1989, in this matter:

It is clear from the record before us that the gravel from the Wagon Box pit is intended for use in a section of the Burr Trail which has been released from the injunction. In our order recognizing an administrative stay pending review on appeal of the BLM EA and FONSI's for the Burr Trail we expressly recognized an exception for the portions of the improvements released from the injunction by the courts:

Recognition of a stay of the effect of the administrative decisions under appeal pursuant to this regulation at 43 CFR 4.21(a) should not interfere with completion of those improvements which were the subject of the prior litigation to the extent already permitted by the courts on judicial remand, *i.e.*, to the extent the injunction has been lifted pending completion of the environmental review process.

108 IBLA at 384 n.3. Review of the cited litigation leads to the inevitable conclusion that those parts of the Burr Trail improvement project which were reviewed by the courts (in a suit to which appellants, Garfield County, and the Department were all parties) and which were subsequently released from the injunction passed environmental muster under NEPA. Accordingly, we find that issuance of the gravel permit was not violative of either the courts' injunction or the Board's stay order.

Appellants have argued that the failure to assess the impact of the gravel pit together with the impact of the Burr Trail improvement constitutes an improper segmentation of the EA. Applying the standards discussed previously, we find from the record that the gravel pit has an independent utility apart from the proposal to improve the 66-mile length of the Burr Trail. The right to improve the adjacent 14-mile stretch of the Trail with a gravel surface has been established. The need for this gravel is not dependent on the plans to improve other areas of the Burr Trail with respect to which the duty of BLM to bar unnecessary degradation imparts some element of discretion. Hence, the scope of the EA was not improperly limited.

With respect to review of the adequacy of the EA otherwise, we note that the Board has held that:

A determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable in light of the environmental analysis. Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984). The party challenging the determination must show it was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. See generally id.; United States v. Albert O. Husman, 81 IBLA 271, 274 (1984); see also Curtin Mitchell, 82 IBLA 275 (1984); In re Otter Slide Timber Sale, 75 IBLA 380 (1983).

Glacier-Two Medicine Alliance, 88 IBLA 133, 140-41 (1985).

Upon reviewing the record we find that the EA for the gravel pit is accompanied by a report of inspection of the site for zoological resources. This report finds that no threatened or endangered animal species have been recorded within 3 miles of the site and concludes that the project will not affect any threatened or endangered animals. A report of inspection for botanical resources attached to the EA found no potential threatened or endangered plant species to be affected. The file also contains a report of an inspection of the site for cultural resources which indicates that no actual or potential national register properties will be affected and concludes that the "project presents no conflict with cultural resources."

The visual contrast rating worksheet for the project appearing in the file recommends that certain mitigating measures be required. Included is a



finding that the gravel pit must be recontoured and reseeded. The EA adopted this recommended mitigating measure.

With respect to the graveling of the access road, we find that this was recognized in the EA as an impact of the gravel pit. Although the EA did not discuss any potential indirect impacts of this improvement of the access road, we are not persuaded this was a material omission in this case. Regardless of whether the access road is a county road or a BLM road, it is clear from the record that it is a preexisting road shown on local maps.

We also note that the EA considered the impact of the alternative to the proposal, i.e., hauling the gravel 17 miles over environmentally sensitive portions of the Burr Trail from Boulder. In conclusion, we find that the EA and attached documentation establishes a reasonable basis for the FONSI for the Wagon Box gravel pit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed to the extent they found the Burr Trail to be an R.S. 2477 right-of-way; affirmed to the extent they found no significant impact from the proposal to improve and gravel segment 1 of the Burr Trail (the proposal remanded by the courts); affirmed as to the FONSI for the Wagon Box gravel pit; and set aside and remanded for further environmental analysis to the extent they found no significant impact from the proposal to improve and pave the length of the Burr Trail.

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C. Randall Grant, Jr.  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge